Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(MUA)(W)-2512–12 OF 2018 AND W-02(MUA)(W)-2522–12 OF 2018
ABDUL KARIM, LEE SWEE SENG AND NANTHA BALAN JJCA
11 DECEMBER 2020

Banking — Islamic banking — Late payment compensation ('Ta'widh') — Whether bank had imposed correct Ta'widh rate and amount following customer's breach of repayment obligations under Al-Bai Bithaman Ajil facility agreements — Whether bank should only have charged Ta'widh rate it had contractually agreed upon with customer and not any other rate — Whether bank had to refund excess Ta'widh amount it had required customer to pay — Whether customer's claim for refund of excess was not time-barred because its cause of action accrued when it settled full sum demanded by bank subject to reservation of its right to challenge Ta'widh amount claimed and to obtain refund of excess paid — Whether bank by accepting customer's payment on those terms could not raise estoppel or accord and satisfaction to resist customer's action for refund — Whether issue of Ta'widh raised in the proceedings was dealt with in previous directions, rulings and resolutions of the Central Bank and the Shariah Advisory Council ('SAC') and did not require court to refer the issue again to the SAC for determination

Pan Northern Air Services Sdn Bhd ('the borrower') was granted a RM41.016m Islamic financing facility by Maybank Islamic Bhd ('the bank') to finance the Borrower's performance of a contract for the Government of Malaysia ('the GoM'). Under the facility, the borrower signed five separate Al-Bai Bithaman Ajil ('BBA') agreements with the bank, each of which contained an asset sale agreement. Section 9.32 in the asset sale agreements provided that if the borrower defaulted in any of its repayment obligations, it had to pay the bank compensation ('Ta'widh') at the rate of 1%pa on the overdue payments from the date of default until the date the amount was paid. The section also provided that the bank was entitled to vary the Ta'widh rate upon giving written notice of variation to the borrower. GoM's premature termination of its contract with the borrower caused the latter to be unable to meet its repayment obligations under the BBA agreements causing the bank to terminate and recall the same well before their maturity date. The bank appointed receivers and managers for the borrower and considered taking execution proceedings against the borrower's securities but, on the borrower's request, decided to grant it time to arbitrate its dispute with the GoM. As soon as the arbitration ended in the borrower's favour, it sought to settle its debt with

the bank and enquired of the total amount outstanding under the BBA agreements. The bank informed the borrower that it had to pay RM42.045m — after a sum of RM1m in Ta'widh had been waived — failing which the waiver would be revoked and the borrower would be liable for the full sum owing under the BBA agreements. Finding the bank's response to its request for details and statement of accounts on the amount owing to be unsatisfactory, the borrower nevertheless complied with the deadline for payment by paying the full sum demanded by the bank subject to the borrower's right to question and ascertain the actual amount payable by way of Ta'widh and Ibra' and to obtain a refund of any excess paid. The bank accepted the payment on the borrower's terms. The borrower subsequently discovered that instead of charging the contractually-agreed Ta'widh rate of 1%pa, the bank had imposed other different rates including the Islamic Interbank Money Market ('IIMM') rate published by Bank Negara Malaysia. The borrower then sued the bank for refund of the excess Ta'widh that it had paid. The bank counterclaimed for payment of the RM1m discount that it had given the borrower in the event the borrower succeeded in its claim. The High Court dismissed both the counterclaim and the borrower's claim holding that the bank had charged the proper Ta'widh amount as it was entitled to follow the Bank Negara Malaysia ('BNM') Guideline 1998 on the matter and to impose a rate more than the contractually-agreed 1%pa. The court also held that since the parties had achieved a compromise or accord and satisfaction, the borrower was estopped from challenging or reclaiming any part of the settlement monies. The borrower appealed against the decision while the bank appealed for a consequential order that if the borrower's appeal was successful, it should be repaid the RM1m Ta'widh discount it had given the borrower. At the appeal hearing, the bank argued, inter alia, that the borrower's claim — filed in 2017 — was time-barred under s 6(1)(a) of the Limitation Act 1953 since its cause of action accrued when Ta'widh was first charged on 1 May 2008 when the borrower breached the BBA agreements.

Held, unanimously allowing the borrower's appeal and the bank's counterclaim, setting aside the High Court's decision and ordering the bank to refund to the borrower the excess Ta'widh amount of RM5,005,285.79 it had paid:

(1) The borrower had paid the bank excess Ta'widh amounting to RM5,005,285.79. This was the difference between RM6,599,937.01 (which was the amount the bank had charged based on the IIMM rate or 'r' rate from the date of termination of the facility agreements on 1 May 2008 until 15 April 2013) and RM1,594,651.22 (which was the Ta'widh amount based on the contractually-agreed rate of 1%pa for the same period) (see paras 73–74 & 76).

(2) The bank had charged Ta'widh in excess of what was permitted contractually as per s 9.32 of the asset sale agreements. It had charged

Ta'widh at the IIMM and/or the 'r' rate. There was no evidence the bank had given the borrower any prior written notification of variation in the Ta'widh rate as required by s 9.32. The Bank Negara Malaysia Guideline could not override what the bank and the borrower had contractually agreed upon. The bank had charged the higher rate of Ta'widh based on its own Interbank Islamic Money Market ('IIMM') rate or 'r' rate for the period from 1 May 2008 (after termination of the facility) until 30 June 2012 and, thereafter, had imposed Ta'widh at the pro-rated IIMM rates fixed by the Central Bank. The bank's counterclaim of RM1m, being the discount it had given for the Ta'widh charged, was consequentially allowed since the correct Ta'widh chargeable was ascertained and the excess was ordered to be refunded. The court agreed with the bank that if any part of the borrower's appeal was allowed, then its discount/partial reduction/waiver of the Ta'widh ceased to have effect or to be binding on the parties (see paras 35–38, 129, 147 & 150).

(3) The borrower's payment of the settlement sum of RM42.045m to the bank was clearly without prejudice to its right to claim for a refund based on the correct amount outstanding. Its claim was clearly filed within the limitation period. Parties, by conduct and consent, could agree to postpone the date of accrual of their right to sue for damages for a breach as in the present case where the bank, on the borrower's request, withheld its recovery action against the borrower and its directors while the borrower pursued its arbitration action against the GoM. As the arbitral award was delivered around 19 February 2013, it was well within the six-year limitation period when the borrower filed the action against the bank. Even if there was no moratorium in place pending the delivery of the arbitral award, the borrower was still within time to bring its action because the settlement sum was paid subject to its right to challenge the correctness and legality of the Ta'widh amount charged and to obtain a refund of any excess paid. By accepting the payment on those terms, the bank entered into a fresh contract with the borrower giving it the right to challenge the Ta'widh amount within six years from the date of the payment. The right to sue for a refund of the excess arose when the payment subject to the terms was accepted by the bank (see paras 104–106, 114, 138–142 & 147–148).

(4) There was no unqualified and unequivocal accord and settlement in the present case. The payment of the settlement sum was a compromise that came with a reservation of the borrower's right to question the Ta'widh amount. It was an accord and satisfaction subject to the reservation of the borrower's right to challenge the correctness of the Ta'widh charged and to claim for a refund of the excess paid. Hence, estoppel could not be raised to resist the borrower's action (see paras 136–137 & 139).

(5) The court did not find the need to refer the issue concerning the Ta'widh in the instant case to the Shariah Advisory Council ('SAC') for determination because the issue had previously been addressed in relevant directions, rulings and resolutions of the Central Bank and the SAC and was not novel. There was also no request from either of the parties to have the matter referred to the SAC (see paras 87–88 & 94–95).

[Bahasa Malaysia summary

Pan Northern Air Services Sdn Bhd ('peminjam') telah diluluskan kemudahan pembiayaan Islam bernilai RM41.016 juta oleh Maybank Islamic Bhd ('bank tersebut') untuk membiayai pelaksanaan kontrak oleh peminjam dengan Kerajaan Malaysia ('the GoM'). Di bawah kemudahan tersebut, peminjam menandatangani lima perjanjian Al-Bai Bithaman Ajil ('BBA') berasingan dengan bank, yang masing-masing mengandungi perjanjian penjualan aset. Seksyen 9.32 dalam Perjanjian Penjualan Aset memperuntukkan bahawa sekiranya peminjam ingkar dalam melaksanakan sebarang kewajiban pembayarannya, ia harus membayar bank pampasan ('Ta'widh') pada kadar 1% setahun ke atas pembayaran tertunggak dari tarikh keingkaran sehingga tarikh amaun dibayar. Seksyen ini juga memperuntukkan bahawa bank berhak mengubah kadar Ta'widh setelah memberikan notis bertulis mengenai variasi kepada peminjam. Penamatan pramatang kontrak oleh GoM dengan peminjam menyebabkan syarikat tersebut tidak dapat memenuhi kewajipan pembayaran balik di bawah perjanjian BBA yang menyebabkan bank menamatkan dan menarik balik kemudahan sebelum tarikh matangnya. Bank melantik penerima dan pengurus bagi peminjam dan mempertimbangkan untuk mengambil prosiding pelaksanaan terhadap kemudahan peminjam tetapi, atas permintaan peminjam, memutuskan untuk memberikannya waktu untuk menyelesaikan pertikaiannya dengan GoM. Sebaik sahaja timbang tara berakhir di pihak peminjam, pihaknya berusaha untuk menyelesaikan hutangnya dengan bank dan menanyakan jumlah amaun tertunggak di bawah perjanjian BBA. Bank memaklumkan kepada peminjam bahawa ia harus membayar RM42.045 juta — setelah sejumlah RM1 juta dalam Ta'widh dipotong — sekiranya gagal pemotongan tersebut akan dibatalkan dan peminjam akan bertanggungjawab untuk keseluruhan amaun yang harus dibayar di bawah perjanjian BBA. Setelah mendapat maklum balas bank terhadap permintaannya untuk perincian dan penyata akaun atas jumlah tertunggan tidak memuaskan, peminjam tetap memenuhi tarikh akhir pembayaran dengan membayar jumlah penuh yang diminta oleh bank yang tertakluk kepada hak peminjam untuk menyoal dan memastikan amaun sebenar yang perlu dibayar dengan cara Ta'widh dan Ibra 'dan untuk mendapatkan pembayaran semula amaun berlebihan yang telah dibayar. Bank menerima pembayaran dengan syarat peminjam. Peminjam kemudiannya mendapati bahawa dengan mengenakan kadar Ta'widh yang dipersetujui secara kontrak sebanyak 1% setahun, bank sebaliknya telah mengenakan kadar

lain yang berbeza termasuk kadar Pasaran Wang Antara Bank Secara Islam ('IIMM') yang dikeluarkan oleh Bank Negara Malaysia. Peminjam kemudiannya menyaman bank untuk mengembalikan lebihan Ta'widh yang telah dibayarnya. Bank membuat tuntutan balas bagi pembayaran pemotongan RM1 juta yang telah diberikannya kepada peminjam sekiranya peminjam berjaya dalam tuntutannya. Mahkamah Tinggi telah menolak kedua-dua tuntutan balas dan tuntutan peminjam dengan memutuskan bahawa bank telah mengenakan amaun Ta'widh yang wajar kerana ia berhak untuk mengikuti Garis Panduan Bank Negara Malaysia ('BNM') 1998 atas hal tersebut dan untuk mengenakan kadar lebih daripada 1% setahun yang dipersetujui secara kontrak. Mahkamah juga berpendapat bahwa oleh kerana pihak-pihak telah mencapai persetujuan atau kesepakatan dan kepuasan, peminjam di-estop dari mencabar atau menuntut kembali setiap bahagian dari wang penyelesaian. Peminjam merayu terhadap keputusan tersebut sementara bank merayu atas perintah berbangkit bahawa sekiranya rayuan peminjam berjaya, ia harus membayar balik potongan Ta'widh RM1 juta yang telah diberikannya kepada peminjam. Semasa pendengaran rayuan, bank berpendapat, antara lain, bahawa tuntutan peminjam — yang difailkan pada tahun 2017 – dihalang oleh had masa di bawah s 6(1)(a) Akta Had Masa 1953 oleh kerana kausa tindakannya bermula apabila Ta'widh pertama kali dikenakan pada 1 Mei 2008 ketika peminjam melanggar perjanjian BBA.

Diputuskan, dengan sebulat suara membenarkan rayuan peminjam dan tuntutan balas bank, mengetepikan keputusan Mahkamah Tinggi dan memerintahkan bank untuk mengembalikan kepada peminjam jumlah Ta'widh lebihan sebanyak RM5,005,285.79 yang telah dibayarnya:

(1) Peminjam telah membayar bank lebihan Ta'widh berjumlah RM5,005,285.79. Ini adalah perbezaan antara RM6,599,937.01 (yang merupakan amaun yang telah dikenakan oleh bank berdasarkan kadar IIMM atau kadar 'r' dari tarikh penamatan perjanjian kemudahan pada 1 Mei 2008 hingga 15 April 2013) dan RM1,594,651.22 (yang merupakan jumlah Ta'widh berdasarkan kadar yang dipersetujui secara kontrak sebanyak 1% setahun untuk tempoh yang sama) (lihat perenggan 73–74 & 76).

(2) Bank telah mengenakan Ta'widh lebih dari yang dibenarkan secara kontrak sepertimana s 9.32 Perjanjian Penjualan Aset. Ia telah mengenakan Ta'widh pada kadar IIMM dan/atau 'r'. Tidak ada keterangan bahawa bank telah memberikan kepada peminjam notis bertulis sebelum itu mengenai variasi pada kadar Ta'widh seperti yang diperuntukkan oleh s 9.32. Garis Panduan Bank Negara Malaysia tidak seharusnya mengatasi apa yang telah dipersetujui secara kontrak oleh bank dan peminjam. Bank telah mengenakan kadar Ta'widh yang lebih tinggi berdasarkan kadar Pasaran Wang Islam Antara Bank ('IIMM') sendiri atau kadar 'r' untuk tempoh dari 1 Mei 2008 (setelah penamatan

kemudahan) sehingga 30 Jun 2012 dan, selepas itu, telah mengenakan Ta'widh pada kadar IIMM secara pro-rated yang ditetapkan oleh Bank Pusat. Tuntutan balas bank sebanyak RM1 juta, yang merupakan potongan yang diberikannya untuk caj Ta'widh, telah dibenarkan kerana Ta'widh yang dikenakan telah ditaksirkan dan lebihannya telah diperintahkan untuk dikembalikan. Mahkamah bersetuju dengan bank bahawa sekiranya mana-mana bahagian rayuan peminjam dibenarkan, maka potongan/pengurangan sebahagian/pengecualian Ta'widh tidak lagi mempunyai kesan atau mengikat pihak-pihak (lihat ayat 35–38, 129, 147 & 150).

(3) Pembayaran peminjam terhadap jumlah penyelesaian sebanyak RM42.045 juta kepada bank jelas tanpa memprejudiskan haknya untuk menuntut pembayaran semula berdasarkan jumlah tertunggak yang tepat. Tuntutannya jelas difailkan dalam had masa. Pihak, berdasarkan kelakuan dan persetujuan, dapat bersetuju untuk menangguhkan tarikh bermulanya hak mereka untuk menuntut ganti rugi atas pelanggaran seperti dalam kes semasa di mana bank, atas permintaan peminjam, menahan tindakan pengambilan semula terhadap peminjam dan pengarahnya sementara peminjam meneruskan tindakan timbang taranya terhadap GoM. Setelah award timbang tara diberikan sekitar 19 Februari 2013, ia masih lagi dalam had masa enam tahun ketika peminjam memfailkan tuntutan tersebut terhadap bank. Sekalipun tidak ada moratorium sementara menunggu award timbang tara, peminjam masih dalam tempoh masa untuk mengemukakan tindakannya kerana jumlah penyelesaian dibayar tertakluk kepada haknya untuk mencabar kebenaran dan kesahihan amaun Ta'widh yang dikenakan dan untuk mendapatkan pembayaran semula sebaran lebihan pembayaran. Dengan menerima pembayaran dengan terma-terma tersebut, bank memasukki kontrak baru dengan peminjam yang memberikannya hak untuk mencabar jumlah Ta'widh dalam masa enam tahun dari tarikh pembayaran. Hak untuk menyaman pembayaran semula lebihan timbul apabila pembayaran yang tertakluk pada terma diterima oleh bank (lihat perenggan 104–106, 114, 138–142 & 147–148).

(4) Tidak ada perjanjian dan persetujuan tanpa syarat dan tanpa sangsi dalam kes semasa. Pembayaran jumlah penyelesaian adalah kompromi yang hadir dari hak peminjam untuk mempersoalkan jumlah Ta'widh. Ia adalah persetujuan dan kepuasan tertakluk kepada hak peminjam untuk mencabar kebenaran Ta'widh yang dikenakan dan menuntut pembayaran semula lebihan yang telah dibayar. Oleh itu, estoppel tidak dapat dibangkitkan untuk menentang tindakan peminjam (lihat perenggan 137–136 & 139).

(5) Mahkamah tidak membuat dapatan keperluan untuk merujuk isu berkaitan Ta'widh dalam kes semasa ke Majlis Penasihat Syariah ('SAC')

untuk diputuskan kerana isu tersebut sebelumnya telah ditangani dalam arahan, aturan dan resolusi yang wajar oleh Bank Pusat dan SAC dan bukanlah baru. Tidak ada juga permintaan dari salah satu pihak memohon agar perkara tersebut dirujuk ke SAC (lihat perenggan 87–88 & 94–95).]

Cases referred to

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)

Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd [2003] 2 MLJ 408, CA (refd)

Bounty Dynamics Sdn Bhd (formerly known as Media Development Sdn Bhd) v Chow Tat Ming & 175 Ors [2016] 1 MLJ 507, CA (refd)

CIMB Bank Berhad v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1, FC (refd)

Insun Development Sdn Bhd v Azali Bin Bakar [1996] 2 MLJ 188, FC (refd)

JRI Resources Sdn Bhd v Kuwait Finance House (M) Berhad (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561, FC (refd)

Kerajaan Malaysia v KCSB Konsortium Sdn Bhd [2019] 10 MLJ 429, HC (refd)

Kong Ming Bank Berhad v Sim Siok Eng [1982] 2 MLJ 205, HC (refd)

Kuwait Finance House (Malaysia) Berhad v Teknogaya Diversified Sdn Bhd & Ors [2012] MLJU 282, HC (refd)

Maybank Islamic Berhad v M-10 Builders Sdn Bhd & Anor [2015] MLJU 2035; [2016] MLRAU 532, HC (refd)

Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor [2011] 3 MLJ 26; [2011] 4 CLJ 654, HC (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Peng Bee Sdn Bhd v Teoh Liang Teh & Ors [2001] 1 MLJ 1, CA (refd)

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2009] 6 MLJ 416; [2010] 4 CLJ 388, HC (refd)

The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon) [2006] 2 MLJ 209, FC (refd)

Legislation referred to

Central Bank of Malaysia Act 2009 ss 55, 56, 57

Central Bank of Malaysia Act 1958 (repealed by Central Bank of Malaysia Act 2009)

Contract Act of 1872 [IN] s 7

Contracts Act 1950 s 7(a)

Housing Development (Control and Licensing) Regulations 1989 Schedule G

Limitation Act 1953 ss 4, 6(1)(a), 29

Appeal from: Civil Suit No WA-22M-198–08 of 2017 (High Court, Kuala Lumpur)

Sukhdev Singh Randhawa (Muhamed Fariz bin Mohd Ali with him) (Azlan Shah Sukhdev & Co) for the appellant.

Andrew Chiew Ean Vooi (Mong Chung Seng with him) (Lee Hishamuddin Allen & Gledhill) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] This judgment grapples with the issue of what is the correct Ta'widh rate that is chargeable under an Islamic Banking contract for a loan that was paid after default of the instalment payments and before the maturity date of the loan.

[2] It also deals with the concomitant issue as to whether when a Shariah question is raised on the charging of Ta'widh should the court invariably have to refer the matter to the Shariah Advisory Council ('SAC') or is it entitled to look at available rulings of the SAC and decide accordingly.

[3] There was also the contractual issue as to when the payment for the outstanding loan was made was there an accord and satisfaction when the borrower said the payment was made subject to the lender charging the right amount for the Ta'widh said to have been incurred.

[4] When the borrower disagreed with the lender's charging of Ta'widh, both on the rate and the calculation, it brought an action for recovery of what was allegedly overpaid at which instance the lender raised the defence of limitation having set in.

[5] Correspondingly the lender had counterclaimed for the sum of RM1m in Ta'widh as a discount given for the settlement sum paid in the event that the court were to hold that there was no accord and satisfaction.

[6] The High Court dismissed the plaintiff borrower's claim on ground that the defendant bank was entitled to charge Ta'widh at the rates imposed by the bank and that the calculation was right. The High Court further held that there was accord and satisfaction with the payment of the sum of RM42,045,000 by the borrower, being the amount calculated by the bank and to be paid on or before the date stipulated by the bank with the bank giving an RM1m discount on the Ta'widh.

[7] With that finding, the High Court struck out the defendant bank's counterclaim for the RM1m, which discount on the Ta'widh would no longer

be binding in the event that there was no accord and satisfaction.

[8] For ease of reference the borrower which was the plaintiff in the High Court below shall be referred to as the borrower or the appellant and the bank who was the defendant in the High Court shall be referred to as the bank or respondent.

[9] The bank had also appealed against the decision of the High Court, more on an abundance of caution, in that should the borrower succeed in this appeal on its claim for a refund of excess Ta'widh paid then the bank said it is also entitled consequentially and correspondingly for a refund of the discount or waiver of RM1m given for the Ta'widh charge.

[10] Both the appeals were heard together with the arguments taken in the borrower's appeal as the outcome would settle how the bank's appeal is to be decided.

THE FINANCING FACILITY AGREEMENTS

[11] Learned counsel for the borrower had succinctly summarised the key unvarnished facts below with respect to the various Islamic Financing agreements and the events leading to the disputes, which narration of the fact we gladly adopt.

[12] The appellant/borrower had vide a letter of offer from Malayan Banking Bhd ('MBB') dated 1 August 2005 obtained an Islamic Financing Facility for the total sum of RM41,016,200 ('the facility') to finance the performance of a contract with the Malaysian Centre of Remote Sensing Agency, Ministry of Science, Technology and Innovation ('the employer').

[13] The borrower had accepted the facility and the Aqad for the acceptance of the facility has been made to comply with the Shariah requirements.

[14] Amongst the terms of the facility is as follows:

(a) Facility:

Facility	Sub Limit (RM)	Total limit (RM)
Murabahah Overdraft		2,000,000
Letter of Credit Murabahah Sight/usance/local/foreign-180 days		30,242,000
BBA Term Financing-i [1]	18,400,000}	
BBA Term Financing-i [2]	4,300,000}	
BBA Term Financing-i [3]	6,112,000}	

	BBA Term Financing-i [4]	955,000}	
	BBA Term Financing-i [5]	475,000}	
	Islamic Bank Guarantee [Performance]		750,000
	Islamic Bank Guarantee [Advance Payment]		5,000,000
	Foreign Exchange Contract		30,242,000
	Total (Including 10% FEC)		41,016,200

PROFIT RATE/COMMISSION/CHARGES

Murabahah Overdraft	5% pa (NEF2)
Letter of Credit Murabahah (Sight/usance/local/foreign-180 days)	ABM Rate
BBA Term Financing-i [1], [2], [3], [4] & [5]	7% p.a (ALCO + 1.25%)
Islamic Bank Guarantee [Performance]	0.125% pm (Min RM50)
Islamic Bank Guarantee [Advance Payment]	0.125% pm (Min RM50)
Foreign Exchange Contract	Foreign Exchange Rate

[15] Upon acceptance of the facility, five separate Al-Bai Bithaman Ajil ('BBA') facilities agreements has been executed between the borrower and Malayan Banking Bhd as follows:

(a) Al-Bai Bithaman Ajil [1] ('BBA-1'):

(i) asset purchase agreement dated 15 February 2006; and

(ii) asset sale agreement dated 15 February 2006 ('the BBA-1 facility agreements')

(b) Al-Bai Bithaman Ajil [2] ('BBA-2'):

(i) asset purchase agreement dated 15 February 2006; and

(ii) asset sale agreement dated 15 February 2006 ('the BBA-2 facility agreements')

(c) Al-Bai Bithaman Ajil [3] ('BBA-3'):

(i) asset purchase agreement dated 30 June 2006; and

(ii) asset sale agreement dated 30 June 2006 ('the BBA-3 facility agreements')

(d) Al-Bai Bithaman Ajil [4] ('BBA-4'):

(i) asset purchase agreement dated 30 October 2006; and

(ii) asset sale agreement dated 30 October 2006 ('the BBA-4 facility agreements')

(e) Al-Bai Bithaman Ajil [5] ('BBA-5'):

(i) asset purchase agreement dated 30 October 2006; and

(ii) asset sale agreement dated 30 October 2006 ('the BBA-5 facility agreements') .

[16] The Court of Appeal in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839 explained a BBA contract as follows:

> [14] A BBA contract is a financial instrument in Islamic banking. It is the most common form of transaction being used in Islamic banking in this country. Basically, a BBA contract is a deferred payment sale contract. It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a property purchase agreement and also a property sale agreement.
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> [15] In a typical BBA contract, the customer will first sell the property or asset to the bank under the property purchase agreement. The bank's purchase price would be the amount required by the customer. That sum is called the facility amount or the financing amount. It is also described as the bank's purchase price.
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> [16] The sale is a cash sale. The bank has to pay the purchase price to the customer immediately upon the completion of the documentation process. But in most cases, where a customer had entered into a sale and purchase agreement with a developer to purchase a house, and therefore needs financing, the bank and the customer would mutually agree that the bank shall release the amount (the bank's purchase price) to the developer in stages against progress payment certificates.
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> [17] With that purchase, the property belongs to the bank. But, the customer is to buy it back from the bank and he will only be able to pay the price over a period of years. The bank will sell but the sale price will not be the same amount as the bank's purchase price. The sale price will include the bank's profit on the sale, which will later be calculated and added to the purchase price. The total amount is now the sale price. In effect, the bank will sell the very same property it has purchased from the customer to him at a selling price under the property sale agreement. The customer then will pay the bank's selling price over a period of years by monthly installments. At that point the customer becomes the owner of the property again.

[17] Vide a vesting order dated 12 December 2007 under Kuala Lumpur High Court Originating Summon No D5-24–349 of 2007 upon a joint application by Malayan Banking Bhd (No Syarikat 3813-K) and the respondent, effective from 1 January 2008 by enforcement of laws, all scheme for sale, purchase and transfer of assets and liabilities (including undertakings, contract of assets and liabilities) for Malayan Banking Bhd's Islamic Financing Businesses was transferred and vested to the respondent.

[18] Between the years of 2007 to 2013, the borrower had filed and litigated a claim against the employer for non-payment of the contract and wrongful

termination of the contract. During these periods, due to the borrower's inability to service the facility, the bank had placed and appointed receiver and manager into the borrower's company.

[19] Upon settlement of the dispute with the employer, the borrower had communicated with the bank to enquire for the settlement of the facility and the bank had vide their letter dated 15 March 2013 requested a sum of RM42,045,000 with waiver of Ta'awidh of RM1m for payment to be made before 30 April 2013 as settlement sum for the facility. No details or any statement of accounts were produced by the bank to the borrower.

[20] Vide a letter dated 25 March 2013, the borrower had requested for the details and statement of accounts from the bank for the purpose of checking and records. Upon the borrower's request, the borrower had received a statement of accounts from the bank vide their letter dated 29 March 2013 for the overdraft facility, the BBA-1 facility, the BBA-3 facility and the BBA-4 facility, all of which are undated and prepared manually without any signature or bearing the bank's letterhead. The bank's letter dated 29 March 2013 also reminded the borrower to pay RM42,045,000 before 30 April 2013.

[21] To comply with the bank's instruction for payment, the borrower vide its solicitors Messrs Arshad Azhari & Associates's letter dated 15 April 2013 forwarded the payment of RM42,0245,000 as at 30 April 2013 for settlement of the borrower's financial obligation with the bank without prejudice to the borrower's right for the correct calculation and statement of accounts, and for the return of the Ta'widh and Ibra' based on the Shariah principles. The payment was made based on the amount demanded by the bank vide their letters dated 15 March 2013 and 29 March 2013.

[22] After perusing through the statement of accounts ('the first statement of accounts'), the borrower had vide its letter dated 4 April 2013 enquired with the bank on several uncertainties and contradicting issues in the BBA facilities contradicting with the Shariah Islamic principles, including but not limited to the uncertainty, variation and differences in the Statement of Accounts, issue of Ta'widh and Ibra' including the calculation of Ta'widh and Ibra'.

[23] The borrower has raised that the Ta'widh imposed upon the facilities based on the first statement of account were imposed upon the sale price based on various different rates between 2.88% to 7.53%. The bank had also stated that the Ta'widh rates were the then current IIMM (Islamic Interbank Money Market) rate or 'r' rate.

[24] Upon checking the published IIMM rate by Bank Negara Malaysia ('BNM'), the borrower found that the IIMM rate represented by the bank in the first statement of account differs and varies from the actual IIMM rate published by BNM.

[25] The borrower had communicated its grievances to the bank but received unsatisfactory and contradicting replies from the bank. The bank gave various excuses and had upon the borrower's further query changed their position and stand especially on the Ta'widh and Ibra' issues.

[26] To resolve the dispute fully and finally the borrower as plaintiff brought the High Court suit against the bank as defendant for various reliefs but at the appeal, the borrower had confined the issue to the rate of Ta'widh charged and a refund of the excess.

Whether the correct rate for Ta'widh rate is 1%pa as stated in the asset sale agreements

[27] We must begin at the beginning which is to look at what the parties had agreed when the contract was entered into. Having established that we would then proceed to consider what had been contended, that any Ta'widh charged is not in compliance with Shariah principles.

[28] The clause governing when and at what rate Ta'widh may be charged is set out in section 9.32 of the respective asset sale agreements as follows:

> *Section 9.32 — Ta'widh*
>
> If the Customer defaults in any payment on its due date of any one or more of the instalments or any other moneys herein covenanted to be paid, *the Customer shall pay to the Bank ta'widh (compensation) at the compensation rate of 1% per annum on the overdue instalments calculated from the date of such default until the date of payment of the amount thereof* and shall not be limited to the period of the financing or any method approved by Bank Negara Malaysia or at the Bank's discretion. The Ta'widh (compensation) on late payment may be varied by the Bank at its absolute discretion or upon receipt of advise from Bank Negara Malaysia *upon written notification to the Customer.* (Emphasis added.)

[29] As clearly pointed out by learned counsel for the borrower, the following pertinent principles for the Ta'widh charged in the asset sale agreement relevant to this case may be distilled from the above clause:

(a) the compensation for Tawidh is contracted at rate of 1%pa;

(b) the Ta'widh is calculated from the date of such default until the date of payment of the amount thereof;

(c) the Ta'widh shall not be limited to the period of the financing; and

(d) the rate of Ta'widh can be varied upon written notification to the customer.

[30] It stands to reason that Ta'widh is not chargeable in a case where there is no default as the borrower would have made payments at the appointed time under the agreed instalments based on the agreed selling price.

[31] It correspondingly makes sense, commercially speaking, for Ta'widh to be chargeable if there is default on the payment of the loan in the instalment payments as, if there had been no default, then the instalments paid could be utilised for further lending by the bank to yield a profit which had now been lost.

[32] Since there had already been a contractually agreed rate of Ta'widh provided for in the event of default in the instalments payments, we should not look at extraneous documents to justify a higher rate of Ta'widh based on what the bank said was the applicable rate.

[33] After all it is consistent with Shariah principles as it is with known principles of contract law that parties are bound by what they have agreed unless there is fraud, coercion, undue influence, mistake or that the term agreed is unconscionable or illegal.

[34] It has not been shown how the 1%pa charged for the Ta'widh for late payment before the maturity date of the facilities is excessive and penalty in nature and that it is over and above the profit that the bank could have made. We must of course bear in mind always that the costs of fund and some profit element had already been costed into the selling price that the borrower would have paid if it had not defaulted in paying the instalments payments until the maturity of the facilities.

[35] Even if the bank could have shown that their profits lost because of the borrower's default is more than 1%pa, even that would not justify varying the Ta'widh rate agreed upon without prior notification to the borrower and in this case there was no evidence of a written notification to the borrower as provided for in the last sentence of section 9.32 of the asset sale agreements.

[36] The BNM Guideline does not override what had been contractually agreed upon earlier between the bank and the borrower even if the Ta'widh rate is more favourable to the borrower.

[37] The bank had charged the higher rate of Ta'widh based on their own Interbank Islamic Money Market ('the bank's IIMM') rate or 'r' rate for the period after termination from 1 May 2008 until 30 June 2012. A

[38] From 1 July 2012 onwards the bank had imposed Ta'widh at the pro-rated IIMM rates fixed by BNM ('BNM Pro-rated IIMM Rate'). B

[39] As the BBA facilities were taken in 2005 the relevant BNM Guideline 1998 would be applicable. In its original language it reads: C

The Bank Negara Letter (BNM Guideline 1998)

Bilangan kami: 2201/015/5/2/1/RMI 10 Disember 1998

Pengarah Urusan Malayan Banking Berhad Menara Maybank

100, Jalan Tun Perak Peti Surat 12010

50936 Kuala Lumpur. D

Tuan,

Pengenaan Penalti Bagi Pembiayaan Perbankan Islam

Bank Negara Malaysia ingin memaklumkan bahawa Majlis Penasihat Syariah Kebangsaan untuk Perbankan Islam dan Takaful telah meluluskan cadangan pengenaan penalti ke atas pembiayaan perbankan Islam yang gagal dilunaskan mengikut jadual. E

2. Sehubungan dengan itu, mulai 1 Januari 1999, Bank Islam Malaysia Berhad dan institusi perbankan yang menyertai Skim Perbankan Islam (SPI) adalah dibenarkan untuk mengenakan penalti ke atas pembiayaan yang gagal dilunaskan mengikut jadual mengikut mekanisma yang ditentukan oleh Bank Negara Malaysia. F

3. Oleh kerana dasar pengenaan penalti ini adalah satu dasar yang baru, institusi perbankan Islam (Bank Islam dan institusi perbankan yang menyertai SPI) hendaklah mengamalkan etika dan pendekatan yang berhemat apabila mengendalikan kes-kes pembiayaan perbankan Islam yang tidak dilunaskan mengikut jadual. Penalti yang dikenakan sebaik-baiknya hendaklan mencerminkan kerugian sebenar yang ditanggung oleh institusi perbankan. Di samping itu, institusi perbankan Islam hendaklah memberi pertimbangan dan budibicara terhadap kes-kes pembiayaan yang menhadapi masalah aliran tunai, ataupun terhadap penerima biaya yang tidak menyalahgunakan kemudahan pembiayaan, ataupun kes-kes yang mempunyai merit supaya dikecualikan daripada dikenakan penalti. G H

4. Pengenaan penalti boleh dikenakan ke atas pembiayaan baru ataupun pembiayaan semasa, kecuali jika perjanjian pembiayaan secara jelas tidak mengenakan penalti sekiranya berlaku kegagalan melunaskan hutang pembiayaan di pihak penerima biaya. Walaubagaimanapun, sekiranya terdapat institusi perbankan Islam yang tidak mahu mengenakan penalti kepada pelanggannya yang gagal melunaskan pembiayaan mengikut jadual, ia adalah hak prerogative institusi berkenaan. Dalam pada itu, Bank Negara Malaysia akan sentiasa memantau perkembangan ini dari semasa ke semasa. Sila hubungi pegawai-pegawai kami di talian 2988044 sambungan 7535/7866/7707 untuk sebarang pertanyaan lanjut. I

Sekian, terima kasih.

Yang benar,

(Mohd Razif Abdul Kadir) Pengarah

Jabatan Pengawalan Bank

[40] Nowhere in this BNM Guideline 1998 is it stated that the Islamic Banking Institutions ('IBI') are allowed to charge Ta'widh but that if it is with respect to penalty that the IBI may be minded to charge then under para 3 thereof the penalty shall reflect the actual loss incurred by the IBI and they shall also give due consideration to cases where there is a problem of cash flow and that there has been no abuse of the facility or that there are merits for the exemption of penalty.

[41] To clarify further in para 4 thereof BNM said the penalty may be imposed except in cases where the agreement does not impose a penalty for default in payment. In any event if there are IBI that do not wish to impose penalty charges on their defaulting customers that is their prerogative.

[42] Even assuming for a moment that the Ta'widh charged is a type of or a subset of penalty, that is also already provided for at 1%pa in the event of default in the schedule of payments and nothing was shown that it is penalty in nature.

[43] Learned counsel for the bank submitted that the BNM Guideline 1998 comes with two attachments or 'Lampiran' though these were not at all referred to in the said letter of BNM but then again the two attachments also referred to penalty not being more than 1%pa. In its original language the two attachments are reproduced below:

Lampiran 1

Pengenaan Penalti Bagi Pembiayaan Perbankan Islam

1. Mekanisme penalty yang boleh dikenakan adalah seperti berikut:

(i) Bagi pembiayaan yang gagal dilunaskan dari tarikh pembiayaan tersebut dikeluarkan *sehingga tarikh matang, kadar penalti yang boleh dikenakan ialah 1% setahun ke atas ansuran tertunggak* ('overdue instalments'). Walau bagaimanapun, jumlah penalti tersebut tidak boleh dikompaunkan ('compounded') kepada ansuran tertunggak tersebut, (Lihat Lampiran 2)

(ii) Bagi pembiayaan yang gagal dilunaskan *dan melangkau tarikh matang, penalti yang boleh dikenakan ialah kadar semasa pasaran wang secara Islam bank berkenaan atau lebih dikenali sebagai kadar 'r'* (iaitu kadar dividen kasar bagi akaun pelaburan bertempoh 12 bulan) ke atas baki harga belian (baki pokok).

Kadar ini akan berubah mengikut kadar 'r' semasa institusi perbankan berkenaan. Seperti perenggan 1 (i), jumlah penalti tersebut tidak boleh dikompaunkan ('compounded') kepada baki harga belian tersebut (Lihat Lampiran 3)

Lampiran 2

Penalti 1% setahun ke atas ansuran tertunggak

1. Kaedah ini digunakan bagi pembiayaan yang gagal dilunaskan dari tarikh pembiayaan tersebut dikeluarkan sehingga tarikh matang. *Jumlah penalti yang boleh dikenakan ialah 1% ke atas ansuran tertunggak ('overdue instalments')*. Walau bagaimanapun, jumlah penalti tersebut tidak boleh dikompaunkan ('compounded') kepada ansuran tertunggak tersebut.' (emphasis added)

[44] Whichever way one reads the BNM Guideline 1998 with or without the attachments or 'Lampiran' there is still no basis or justification to charge Ta'widh at the banks's IIMM rate before maturity date. There is also a distinction in the penalty charged before the maturity date and after the maturity date.

[45] We would of course gladly endorse such an approach, consistent as it is with both common as well as commercial sense, undergirded as it is with universal principles of contract. There is nothing stopping any IBI from being more generous than they should be for as wise Solomon once observed: whoever lends to those in need (without charging usury of course) would in reality be lending to God who is no man's debtor!

[46] Thus even as early as 1998, with this BNM Guideline, the IBI may provide in their agreements the charging of penalty for default in the schedular payments of the loan facilities but that what is charged must be the actual loss suffered by the IBI.

[47] It goes without saying that it must first be provided for in the agreement executed and if it is not provided for it simply means that the IBI would not be charging penalty. Here there is no provision on penalty in the BBA facilities agreements entered into in 2005 and the bank must be held to have contractually agreed not to so charge, being fully conscious of the BNM Guideline of 1998.

[48] The bank must be taken to have exercised their prerogative not to charge penalty. Instead it mentioned that Ta'widh would be chargeable at the rate of 1%pa and as it has not been shown how this is unconscionable as in that it is in reality a penalty which was not agreed upon or that it is not a reflection of the actual loss incurred by the bank, this court would allow it.

[49] It would be unconscionable for the bank, by a back door method, to introduce penalty by way of increasing unilaterally the rate for Ta'widh when there is a default in the schedule of payments. While BNM may have permitted penalty to be charged that is an actual reflection of the loss suffered by the bank, there must first be an enabling provision in the BBA facilities agreements for penalty to be charged. In the absence of such a provision it would be disingenuous for the bank to impose it under the guise of their IIMM rate or the BNM pro-rated IIMM rate when contractually Ta'widh had been fixed at 1%pa and no written notice had been given to the borrower for its increase.

[50] We therefore are perplexed with the position taken by the learned High Court judge when she held as follows in her grounds of judgment:

> 24. *In compliance of the BNM Guideline 1998, the defendant imposed Ta'widh at the defendant's IIMM/'r' Rate after the balance Purchase Price became due and payable*. Therefore, I agree with the defendant's submission that they merely complied with the formula prescribed in the BNM Guideline 1998. Also *there is nothing in the BNM Guideline 1998 which requires notice to be given in imposing Ta'widh at the rates set out therein*. Given these, there is no requirement to give notice particularly when the parties already agreed that the Guideline issued by BNM would apply. Any lack of such notice did not prejudice the plaintiff as *the formula of Ta'widh was decided by the regulator, BNM*.

[51] At the risk of repeating ourselves the BNM Guideline 1998 did not address the issue of Ta'widh but penalty and neither was there a formula of the bank's IIMM rate for Ta'widh in the BNM Guideline.

[52] As for the BNM Guideline 1998 being silent on the need to give notice for the rate set for the Ta'widh, all it simply means is that in the absence of any guideline on the giving of notice, then the contractual requirement of notice for any change in the Ta'widh has to be followed unless the bank is imposing the contractually agreed rate of 1%pa.

[53] It cannot be that just because the BNM Guideline 1998 is silent on the need to give notice for any change in the Ta'widh rate then no notice is required. Taking that argument to its logical conclusion and a highly dangerous one at that, it would mean that where the guideline is silent on any matter the bank may impose any terms they see fit, without the need to comply with the contractually agreed terms! That would be repugnant to any understanding of contract law whether secular or Islamic.

[54] The issue that the BNM Guideline 1998 sought to address was the validity of the charging of penalty and in 1998 BNM had already addressed that. Basically, the IBI may charge that in their agreements but that it shall be

the actual loss of profit suffered by the banking institutions and that it must be fair and reasonable taking into account all relevant factors set out in the said guideline.

[55] It was clearly a case where penalty was not provided for contractually, and the bank has now imposed the so-called Ta'widh at more than the stated rate without giving any written notice.

[56] In fact at the oral argument stage, learned counsel for the borrower had conceded and condescended to that the 1%pa rate for Ta'widh is what is contractually provided for and not the bank's IIMM rate or the BNM pro-rated IIMM rate for the period from default to full payment before maturity dates of the BBA facilities.

[57] The BNM Guideline 1998 does not in any way prohibit any IBI from granting any terms more favourable to their customers and it certainly does not take away any already accrued contractual rights to the detriment of the customer or the borrower here. At any rate the BBA facilities agreements were executed after the BNM Guideline 1998 and any reference to penalty could easily have been incorporated into the BBA facility agreements.

[58] The position becomes unmistakably clear, if at all there was any room for doubt, when BNM subsequent guidelines, Resolutions, Rulings and Illustrations again addressed this issue of Ta'widh.

[59] We find the following passage in *Bullen & Leake & Jacob's Malaysian Precedents of Pleadings* (Sweet & Maxwell, 2017) helpful:

> *'Ta'widh and gharamah*
>
> 21.27 Notwithstanding the promise by the customer to pay the instalments punctually, in practice, there will always be customers who delay in their repayments to the bank. If this is a conventional loan, the bankers could charge a specific defaulting interest until full settlement. For the recovery of *muamalat* matters, the SAC has ruled that Islamic banks can charge two different charges as late payment charges, ie *Ta'widh* (compensation) and *gharamah* (penalty). Both of these can be charged by Islamic banks on their customers who have delayed in their payment to the bank. In the earlier, *BNM set the 1% rule during the tenure namely, the ta'widh payable should not be more than 1% per annum on daily rest basis over the arrears. It must be non-compounding. However, in the event that there is a default in payment after the maturity of the tenure, the rate applicable should not be more than the prevailing rate of the International Islamic Monetary Market ('IIMM').* This is the reference rate prescribed by BNM which must be observed by the IFIs to compensate the financier for all the losses suffered due to late payment by the customer. (Emphasis added.)

[60] The late payment charges ('LPC') Guidelines 2012 explains the concept of Ta'widh (compensation) and Gharamah (penalty).

[61] We agree with learned counsel for the borrower that in the context of the LPC Guideline, Ta'widh refers to the amount that may be compensated to the IBI based on the actual loss incurred due to default, whilst Gharamah refers to the penalty charged on the defaulters over and above the Ta'widh (section 5.1 LPC Guideline 2012 — p 1945, *Rekod Rayuan Bahagian* C (*Jld* 4)).

[62] Section 5.2.2 of the LPC Guidelines 2012 explains in detail the principle and the application of Ta'widh as follows:

> Section 5.2.2 — Principle 2: Ta'widh
>
> The IBI shall be compensated up to the amount of actual loss incurred as a direct result of the delay in repayment or default by the customer.
>
> The IBIs are allowed to be compensated by way of Ta'widh up to (or equivalent to) the actual amount of losses incurred by the IBI's subject to the overall combined rate limit. In determining the compensation rate of actual loss incurred, the IBI's are required to observe the reference rate as prescribed by the bank as follows:
>
> (i) *The actual loss to be compensated from any default payment, from the date of payment until the maturity date shall not be more than 1% per annum*:
>
> (a) on the overdue instalments of the Islamic financial product in the case of default of scheduled payments (Diagram 2.1); or
>
> (b) *on outstanding balance (subject to ibra' if applicable) of the Islamic financial product in the case of default causing the entire facility to be recalled* or brought to court for judgment *prior to maturity (Diagram 2.2* and 2.3)
>
> (ii) The actual loss to be compensated from *default payment which exceeded the maturity date shall not be more than the prevailing daily overnight Islamic Interbank rate (IIMM)* on the outstanding balance (subject to Ibra' if applicable) of the Islamic financial product (Diagram 2.4 to 2.6)
>
> (iii) The reference rate for the actual loss shall be determined at the point of default, computed on a monthly basis from the payment due date. (Refer to the illustration in Appendix I).
>
> (iv) The Ta'widh earned shall also be included in the computation of distributable to depositors/investment income holders. (Emphasis added.)

[63] The LPC Guidelines 2012 were issued after the BBA facility agreements were executed in 2005 but it endorsed what had been the practice of the IBI in the charging of 1%pa for the Ta'widh.

Diagram 2.1

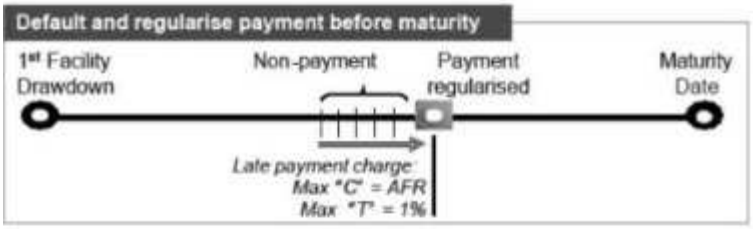


Diagram 2.2

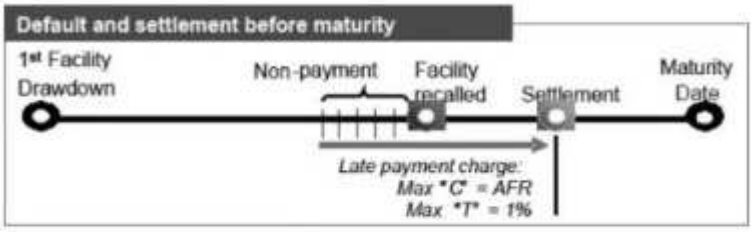


Diagram 2.3

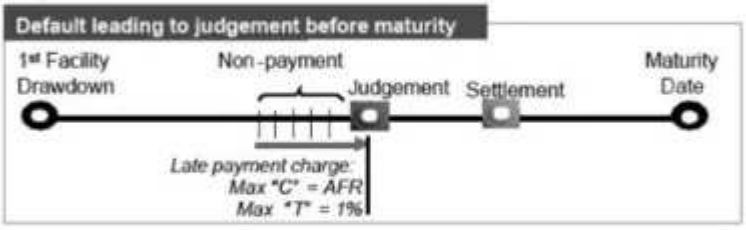


Diagram 2.4

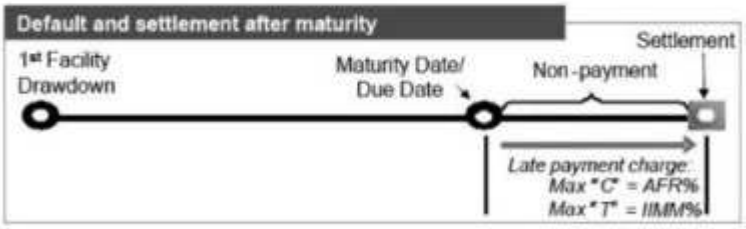
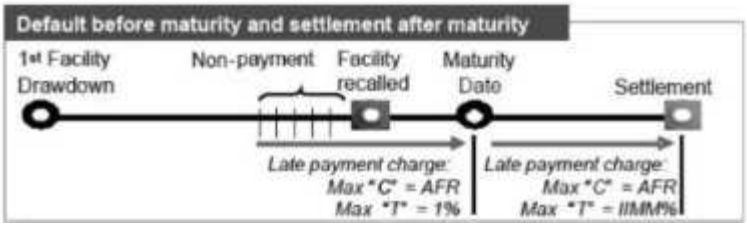


Diagram 2.5



[64] The illustration that fits the present scenario where there was a termination of the BBA facility agreements and a recall of the facility is that of Diagram 2.2 in the LPC Guidelines 2012 where that Diagram 2.2 is shown above together with the other diagrams for both comparison and contrast.

[65] There is no rhyme nor reason to bring forward the maturity date which remains constant throughout the BBA facility even in the case of default and early termination and recall followed by settlement before the maturity date. There is no basis for suggesting and interpreting the BBA facilities tenured for eight years to have prematurely matured before the eight years period upon termination or cancellation or recall of the facilities which involves the borrower paying back the bank the balance selling price of the assets. The profit for the BBA facilities had been contracted and calculated up to the very last day of the eight years tenure as the profits earned by the bank on the maturity date of the facilities.

[66] In fact the maturity date remains constant in all the five illustrations further underscoring the point that early or late settlement does not change the maturity date irrespective of whether there is a recall of the facility.

[67] As borne out by diagram 2.2 there was first a default in payment of the schedule of payments and then the facility was recalled and settlement was before the maturity date for each of the BBA facility agreement in dispute.

[68] The only time when the IBI was allowed to charge the IIMM rate was after the maturity date as shown in Diagram 2.4 and 2.5.

[69] We must be forgiven for not been able to appreciate the learned judge's reasoning at para 26 of her grounds of judgment reproduced below:

> 26. Therefore, the defendant is entitled to impose Ta'widh pursuant to BNM Guideline 1998 which is the applicable Guideline on Ta'widh at the time when the Financing Agreements were executed, *when the BBA Facilities were recalled and when the defendant began to impose Ta'widh.* Pursuant to the BNM Guideline 1998, upon cancellation of the BBA Facilities, *the defendant is entitled to impose Ta'widh at the Rate that has been imposed by the bank and not merely 1% p.a*. (Emphasis added.)

[70] In *Kuwait Finance House (Malaysia) Berhad v Teknogaya Diversified Sdn Bhd & Ors* [2012] MLJU 282 Justice Mohd Zawawi bin Salleh J (now FCJ) observed as follows:

> [21] Berdasarkan terma di atas, adalah jelas bahawa terdapat dua (2) kadar fi pampasan/ganti rugi yang dipersetujui oleh kedua-dua pihak apabila berlaku kelewatan bayaran ansuran dan bayaran tertunggak, iaitu:

(i) Sebelum tempoh matang kedua-dua Kemudahan Tawarruq tersebut tamat; dan

(ii) Selepas tamat tempoh matang kedua-dua Kemudahan Tawarruq tersebut.

[22] Peguam terpelajar pihak plaintif telah memaklumkan kepada mahkamah bahawa tempoh matang kedua-dua kemudahan Tawarruq tersebut akan tamat pada 29 Januari 2014. Oleh yang demikian, pada pendapat mahkamah, hak plaintif untuk satu fi pampasan lanjutan atas pasaran Wang Inter-bank Islam plaintif (R Rate) hanya boleh dibenarkan jika tempoh matang kedua-dua kemudahan Tawarruq tersebut tamat.

[71] What then is the correct Ta'widh that is chargeable for a default before maturity date and upon the termination of the facility agreements?

[72] Learned counsel for the borrower had prepared a table in encl 29 the appellant's supplementary BOD at p 8 setting out the bank's calculation of the Ta'widh at column (a) and (b) and the correct calculation at column (c) as follows:

Table of Ta'widh charged by the bank

Financing Facilities	Tawidh at 'r'/IIMM rate on the Balance Purchase Price (after deduction of the waiver and profit refunded due to early settlement) -see Tab 89, 90 & 91 CCDS (a)	Ta'widh at 1% p.a. on Balance Sale Price STATEMENT OF ACCOUNT A (b)	Differential Tawidh between 'r'/IIMMrate on Balance Purchase Price and 1% p.a. on Balance Sale Price (a) – (b) (c)
BBAA TF1	4,530,128.82 [5,551,890.42 – 1,000,000 (Ta'widh waived & not paid by customer) – 21,761.60 (Ta'widh sum refunded to Customer)]	1,158,646.54	3,371,482.28

BBA TF3	1,775,818.14 [1,782,494.24 – 6,676.10 (Ta'widh sum refunded to Customer)]	373,062.51	1,402,755.63
BBA TF4	293,990.05 [295,095.26 – 1,105.21 (Ta'widh sum refunded to Customer)]	62,942.17	231,047.88
TOTAL	6,599.937.01	1,594,651.22	5,005,285.79

[73] As can be seen and as confirmed by learned counsel for the bank, if the bank had charged Ta'widh based on the IIMM rate or r rate on the balance purchase price from the date of termination of the facility agreements ie from 1 May 2008 till 15 April 2013 the amount would be RM6,599,937.01. In fact, the bank actually charged RM7,629,479.92 before giving a discount of RM1m on the Ta'widh which is now the subject matter of the appeal by the bank on the striking out of their counterclaim in the High Court below.

[74] Learned counsel for the bank also confirmed that based on the rate of 1%pa for the same period, the amount works out to be RM1,594,651.22. Hitherto whenever the rate of 1%pa was referred to, it had not been stated whether it is on the balance purchase price or on the balance sale price.

[75] We wish to state here that the 1%pa of Ta'widh should be based on the balance sale price as if there had not been a default the full sale price would have been paid upon maturity date. Hence any failure to pay the schedular instalments payments would require the borrower to compensate the bank based on the balance sale price as at the date of termination of the facility agreement upon default plus the compensation based on the profit that the bank would have earned had the instalments been paid on time as represented in the Ta'widh.

[76] Therefore the excess Ta'widh paid is *RM5,005,285.79* (RM6,599,937.01 – RM1,594,651.22) which amount we had ordered the bank to refund to the borrower.

Whether the issue as to the charging of Ta'widh should be referred to the Shariah Advisory Council for determination as to whether it is illegal under the Shariah

[77] The fact that the civil court has jurisdiction to hear a claim based on an Islamic finance instrument is not in dispute. See *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22

(CA), *Maybank Islamic Berhad v M-10 Builders Sdn Bhd & Anor* [2015] MLJU 2035; [2016] MLRAU 532, *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408 (CA).

[78] The concern that a certain Islamic Banking instrument or term in it should be Shariah compliant is understandable not least because there are various interpretations of what is Shariah-compliant and what is not amongst Islamic Scholars worldwide depending on one's school of thought or *mazhab*. See *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2009] 6 MLJ 416; [2010] 4 CLJ 388 and *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26; [2011] 4 CLJ 654 where this concern was acknowledged.

[79] The Federal Court in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Berhad (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561, speaking through Justice Mohd Zawawi Salleh FCJ captured this concern concisely as follows:

> [246] Hence, Shariah compliance is the backbone of Islamic banking finance industry and Shariah principles are the raison détre of all Islamic financial contracts. It gives legitimacy to the practices of Islamic banking and finance industry and thus validate the profits. It also boosts the confidence of all stakeholders that all the practices and activities of the bank are in compliance with the Shariah. Besides, s 28(i) of the Islamic Finance Services Act 2013 states that one of the duties of an Islamic financial institution is 'to ensure that its aim and operation, business, affairs and activities are in compliance with Shariah'.
>
> [247] However, compliance with Shariah will be confidently achieved only by having a proper Shariah governance framework. This is because Shariah governance is meant to ensure compliance by Islamic banking and finance industry with the rules of Shariah.

[80] We accept the fact that the civil court shall not decide on whether a matter under Islamic Banking is in compliance with the Shariah as this comes within the expert opinion of the SAC whose opinion is binding on the civil court as stated by the majority in the *JRI Resources* case. A brief history to the setting up of the SAC could be found in the dicta of Justice Azahar Mohamed FCJ (now CJM) in *JRI Resources* case as follows:

> [172] Among the challenges facing the Islamic financial services industry are the development of financial services and instruments that are Shariah compliant, commercially viable, valid and enforceable, based on the prevailing governing laws (see *The New Central Bank of Malaysia Act 2009 (Act 701): Enhancing the Integrity and Role of the Shariah Advisory Council (SAC) in Islamic Finance* by Hakimah Yaacob). Consequently, the SAC was established to preclude any uncertainties in the interpretation of Islamic laws with regard to Islamic financial business. The SAC was established pursuant to s 124 of the (now repealed) Banking and Financial Institutions Act 1989, which was amended vide the Banking and Financial

Institutions (Amendment) Act 1996. The amending Act had amended s 124(7) to state as follows:

(7) For the purposes of this section:

(a) there shall be established a Syariah Advisory Council which shall consist of such members, and shall have such functions, powers and duties as may be specified by the Bank to advise the Bank on the Syariah relating to Islamic banking business or Islamic financial business;

[173] It was as a result of all the above that the Central Bank of Malaysia Act 1958 ('the 1958 Act') was then amended to introduce s 16B, which came into force on 1 January 2004. Section 16B of the 1958 Act provided for the SAC to become the authority for the ascertainment of Islamic law for Islamic banking business, takaful business, Islamic financial business, Islamic development financial business or any other business which is based on Shariah principles that are supervised and regulated by CBM.

[81] However we must hasten to add that not every matter raised for submission to the SAC should be referred to the SAC especially when the same matter had already been addressed by specific guidelines, rulings or resolutions issued by BNM under the various statutes in relation to Islamic Banking or by the SAC.

[82] This is so even after the enhancement of the status of the SAC rulings in the Central Bank of Malaysia Act 2009 ('the CBMA 2009') that repealed the Central Bank of Malaysia Act 1958 ('the CBMA 1958') where in s 57 of the CBMA 2009 it further provides that any ruling made by the Shariah Advisory Council pursuant to a reference made shall be binding on the Islamic financial institutions under s 55 and the court or arbitrator making a reference under s 56.

[83] Section 56 of the CBMA 2009 clearly envisages two options that the Civil Courts have when confronted with a request to refer a question to the SAC with respect to a dispute involving an Islamic finance claim. One is to ascertain if there are already existing rulings of the SAC on the question raised and only when there is none, then to refer to the SAC for its ruling as was held by the majority in the *JRI Resources* case) as follows as per Azahar Mohamed FCJ (now CJM) as follows:

[185] Pursuant to the impugned provisions, it is now mandatory for the courts *to refer to any published rulings of the SAC and in the absence of such rulings, to refer a question to the SAC for a ruling on Shariah matters* and such rulings shall be binding on the courts [under s 57]. Section 56 of the CBMA 2009 provides:

(1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall —

(a) *take into consideration any published rulings of the Shariah Advisory Council; or*

(b) *refer such question to the Shariah Advisory Council for its*

(c) *ruling*.

(2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.' (emphasis added)

[84] The civil court decides whether an issue raised should be referred to the SAC for its expert opinion having regard to whether the issue calls for determination under Shariah law and even if it does whether the issue had been raised and decided before by the SAC, in which case the civil court would generally follow the opinion as already rendered by the SAC.

[85] Otherwise there would be unnecessary reference to the SAC merely because an issue is raised by a borrower and couched as a Shariah issue for determination by the SAC. Not only would that be an abuse of the process of referral to the SAC but that the proceedings in the court would be delayed against the backdrop of innumerable questions that may be crafted from time to time for reference to the SAC before the conclusion of a trial!

[86] If support for such an approach is needed, we would refer to *Bullen & Leake & Jacob's Malaysian Precedents of Pleadings* (Sweet & Maxwell, 2017) as follows:

Illustration of the working process of sections 56 and 57 [CBMA 2009]

21.14 The case of *Bank Islam Malaysia Berhad v Helcom Engineering Corp Sdn Bhd & Ors* [2011] 1 LNS 1862 provides a good case study on how a reference to the SAC could be done in a litigation case when the parties dispute the validity of a practice under the *Shariah*. The *Shariah* issue in dispute in this case was concerning the late payment compensation (*ta'widh*) charged by the financier. In this case, the parties had agreed to restructure the outstanding sum under few previous facilities into a Cash Note-i Facility. The defendants failed to service the payment of the Cash Note i-Facility on a regular basis. After the defendants failed to respond to the letter of demand issued by the plaintiff's solicitor, the plaintiff brought a civil action against the defendants. In defence to the summary judgment application filed by the plaintiff, the defendant alleged, *inter alia* that the pre-determined *ta'widh* (compensation) was actually interest imposed by the bank.

21.15 Being of the view that the dispute was actually Shariah in nature, the court initiated section 56(a) *(reference to published ruling by the SAC), in its attempt to ascertain the position of the Shariah on this.*

21.16 The court noted the SAC had resolved earlier in its published rulings that ta'widh as a result of the default on the part of the customers was permissible to be claimed by the bank. However, with regard to the question whether ta'widh can be pre-determined by

the parties in the agreements without proving the damages suffered by the bank, there was no published ruling by the SAC.

21.17 Hence, it fitted perfectly into the ambit of section 56(b) to make a specific reference to the SAC. Upon application by the defendants, the court formulated a *Shariah* issue and referred it to the SAC. The question put forward to the SAC was:

Whether the *ta'widh* rate can be fixed and/or agreed upfront/pre-determined by the parties in a contract without the need to prove the loss suffered by the Bank.

The SAC replied speedily (11 days later), *inter alia*, that:

(1) The parties to a contract cannot pre-determine the *ta'widh* rate by adopting their own calculation.

(2) However, the contracting parties may agree on a *ta'widh* rate fixed by the authority. The authority in the banking industry is BNM.

21.19 It is appropriate to note here that in the question posed to the SAC, details or background facts of the case were not actually mentioned. The reply from the SAC was but to outline the *Shariah* principle on point. Adopting it and applying it to the material facts of the case, the court thus decided that the claim for *ta'widh* by the plaintiff in this case was lawful. (Emphasis added.)

[87] When we look at the issue of Ta'widh raised, we find that the matter had been addressed in the relevant directions, rulings and resolutions of BNM and the SAC.

[88] Thus if the borrower refers to a ruling of the SAC and submits that it is applicable and the bank submits that it is not or that another ruling is applicable because the factual matrix is different, then it is for the court to interpret the seemingly contradictory rulings or resolutions following the established principles of interpretation. Only when the court is of the view that the matter is novel in that existing rulings or resolutions do not deal with the matter or issue at hand then only would there arise a need to refer to the SAC.

[89] The borrower had raised that there should be no imposition of Ta'widh based on the SAC Resolution at its 24th meeting dated 24 April 2002 as compiled in the *BNM Shariah Advisory Resolution* (2nd Ed) as follows:

82. Imposition of Compensation on a Customer who Makes Early Settlement

The SAC was referred to on the issue as to whether AN Islamic financial institution may impose compensation on a customer who makes early settlement in an Islamic financing.

Resolution:

The SAC in its 24*th*e meeting dated 24 April 2002 has resolved that an Islamic financial institution is *not allowed to claim compensation* from a customer who make early settlement in an Islamic financial. (Emphasis added.)

[90] Learned counsel for the borrower submitted that since the facilities were fully repaid and settled on 15 April 2013, earlier than the facility tenure of eight years which will mature on 1 September 2014 (BBA-1), 6 October 2014 (BBA-3) and 1 June 2015 (BBA-4) respectively, then based on the above resolution, no Ta'widh is chargeable.

[91] That of course does not take into consideration that there was default in the schedular payment leading to a termination of the facility agreements and there was non-payment from 1 May 2008 till 15 April 2013. The above resolution was obviously referring to a situation where there was no default and there was early settlement before maturity date. The more relevant ruling would be the BNM Guideline 1998 as alluded to above and as further clarified and explained by the LPC Guidelines 2012.

[92] Therefore when confronted by counsel that there is a Shariah issue to be referred to the SAC the judge in the civil court need not have to immediately raise his hands and say 'Hold it, I cannot continue further until this matter is referred to the SAC for its opinion which would be binding on me'.

[93] He should instead follow the following steps:

(a) is the issue raise ostensibly a Shariah issue or is it a pure contractual issue bereft of any Shariah element;

(b) if it is a Shariah issue is there already a guideline, ruling or resolution of BNM or SAC on this particular issue;

(c) if there are more than one guideline, ruling or resolution on this issue the court may proceed to decide which is the applicable one considering the factual matrix of the case; and

(d) if the matter or issue raised is a Shariah issue and there is no pending guideline, ruling or resolution on it, then the court would refer the matter or issue to the SAC.

[94] We cannot see how the reference to the SAC would throw fresh light on the issue of the imposition of Ta'widh in the factual matrix of this case. The borrower seemed to have abandoned this issue of the need to refer to the SAC as this court had decided on what is the proper calculation of the Ta'widh and the borrower had not appealed against this decision.

[95] The bank and the High Court had taken the view that there is no need to refer the issue of Ta'widh to the SAC and with that we agree for the reasons given above.

Whether limitation had set in when the borrower claimed for the excess amount of Ta'widh paid

[96] The bank's contention is that it is too late now for the borrower to have sued for a refund of the excess Ta'widh paid on 30 April 2013 because the claim is statute-barred. The bank said that the cause of action accrued when Ta'widh was first charged on 1 May 2008 when the borrower was in breach of the facilities agreements.

[97] The bank's argument is that if the Ta'widh is wrongly charged then the breach first arose then and the limitation period to bring an action to recover the amount overcharged expired on 2 May 2014. Since the appellant Borrower only brought this action on 23 August 2017, it is caught by limitation as it is some three years after the expiry of the limitation period. See s 6(1)(a) of the Limitation Act 1953.

[98] Under s 6(1)(a) of the Limitation Act 1953, the borrower has six years to bring his action against the bank under contract as represented by the facilities agreements from the date the cause of action accrued.

[99] The Federal Court in *Nasri v Mesah* [1971] 1 MLJ 32, explained that:

> ... time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. *A cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach*. (Emphasis added.)

[100] It was further clarified as follows:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but *it has always been held that the statute runs from the earliest time at which an action could be brought*. (Emphasis added.)

[101] More recently the Court of Appeal in *Bounty Dynamics Sdn Bhd (formerly known as Media Development Sdn Bhd) v Chow Tat Ming & 175 Ors* [2016] 1 MLJ 507, held, inter alia, that:

> The respondents' claims were time barred under s 6(1)(a) of the Limitation Act 1953. Being founded in contract, the principle of law was that a claim for breach of contract had to be commenced at the earliest possible time *when the innocent party became aware of the breach*. (Emphasis added.)

[102] See also: *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205

(High Court) and *Peng Bee Sdn Bhd v Teoh Liang Teh & Ors* [2001] 1 MLJ 1 (Court of Appeal).

[103] We are not unaware of the dicta of the Federal Court in *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209, where the court held, inter alia, that:

> (3) A cause of action founded on contract accrues on the date of its breach and time begins to run from that breach. In the instant case, the claimant's cause of action only arose when the appellant allegedly breached its obligation to pay the claimant his commission in 1986. When the claimant filed his action in court in 1993, the claim had already become time-barred ...
>
> (4) In the instant case, *there was no contractual modification or alteration in any of the contracts binding the claimant to the appellant that could be relied upon to shift the time of breach to some time in the future. In the absence of such modification, the general principle of law that time begins to run from the date of breach, applied* ...
>
> (5) The Court of Appeal had also erred in concluding that so long as the parties remained in contractual relationship, no period of limitation existed. There was no basis for such a conclusion given that the Act itself prescribes when time begins to run for the purpose of computing limitation periods ...

[104] We have no quarrel or quibble with the above proposition that generally a cause of action in contract would arise from the date of the breach of the contract. However, parties by conduct and consent may agree to postpone the same until the happening of a certain event as in a moratorium to be put in place.

[105] A moratorium is in effect a case where the parties have agreed not to raise or plead limitation for the period agreed upon as a defence to a claim and this is envisaged in s 4 of the Limitation Act 1953 as follows:

> 4 Limitation not to operate as a bar unless specially pleaded
>
> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[106] The agreement on the moratorium is patent from even the written submission of the respondent bank as follows:

> 11. With the R & M's consent, the directors of the appellant brought an arbitral claim against the Government of Malaysia for breach of a contract between them. The directors of the appellant also requested the R & M not to sell the assets charged by the appellant to the Respondent as the availability of the charged assets would greatly enhance the appellant's bargaining power and prospect of success of their claim and to seek a higher compensation against the Government of Malaysia. *With*

A *the agreement of the Respondent, the R & M agreed to the appellant's directors' request. Under these circumstances, the Respondent withheld recovery action against the appellant and their directors.*

12. Between year 2011 and 24.7.2012, at the request of the R & M, the Respondent furnished the appellant with the amount due and owing under the BBA Facilities to
B enable the appellant to prosecute the arbitral claim against the Government of Malaysia. The appellant did not raise any issue with the calculations provided.

13. On or around 19.2.2013, the learned Arbitrator made an award in favour of the appellant and awarded total damages of RM66,680,489.78 and interest of RM25,344,894.63 ('Arbitral Award'). This sum was duly paid by the Government
C of Malaysia to the appellant. (Emphasis added.)

[107] We must say the bank was acting in compliance with Shariah principle that since the default was not a case where the borrower willful refusal to pay
D but rather that it could not as the Government of Malaysia had wrongfully terminated their contract with them and there was no payments made by the Government of Malaysia until the matter was taken to arbitration and an award was handed in its favour.

E **[108]** The borrower wasted no time in paying the bank and did so on 30 April 2013, some three months after the award, subject to terms.

[109] Assuming for a moment that it had taken more than six years from 1 May 2008 for the award to have been delivered, if the borrower had not paid,
F it would still be within time for the bank to sue to recover under contract in the facilities agreements as time would only begin to run after the award had been delivered.

G **[110]** The Federal Court in the case of *Insun Development Sdn Bhd v Azali Bin Bakar* [1996] 2 MLJ 188 at p 196, observed as follows:

It is clear law that *in the absence of express contractual provision*, the purchaser's right to sue for damages would accrue on the date of the breach of contract. (See *Nasri v Mesah* [1971] 1 MLJ 32 at p 34; *Reeves v Butcher* [1891] 2 QB 509 at p 511; *Gibbs*
H *v Guild* (1881–1882) 8 QBD 296 at p 302).

But, *the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages which, of course, was what had happened in Loh Wai Lian.* (Emphasis added.)

I **[111]** An example of parties mutually agreeing to a different date for the commencement of a cause of action in contract would be cl 24(d) of the statutory standard form sale and purchase agreement (land and building) in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 as follows:

(4) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Property.

[112] Ordinarily the cause of action would have arisen the moment the developer fails to deliver vacant possession within 24 months from the date of the sale and purchase agreement but with the agreement, limitation does not begin to run until the purchaser takes vacant possession of the completed property.

[113] See also the case of *Kerajaan Malaysia v KCSB Konsortium Sdn Bhd* [2019] 10 MLJ 429 where parties in a consent judgment agreed to a moratorium and not raise limitation for a certain period if the terms of the consent judgment could not be fulfilled with the parties at liberty to then file a fresh claim against each other.

[114] As the award was delivered around 19 February 2013 it was well within the six year limitation period when the borrower as the plaintiff in the High Court brought this action on 23 August 2017.

Whether there was a full accord and satisfaction with the payment of RM42,045,000 barring the borrower now claiming a refund of the excess

[115] Whether or not there is a full and unqualified accord and satisfaction would have to be determined from the four walls of the cover letter of 15 April 2013 enclosing the cheque for the payment of RM42,045,000. The cover letter of the borrower's solicitors Messrs Arshad Azhari & Associates dated 15 April 2013 could not have been clearer. It reads:

3. We were further instructed that YBhg Dato' Ahmad Zabidi bin Md Zain in his personal capacity as the director and shareholder of PNAS has disputed and put up a notice that there are discrepancies in the Statement of Accounts furnished by your good Bank to our client, in excess of RM6,030,617.74, *manifestly erroneous* and syariah non-compliance (sic) for reasons stated in his letter to your good bank dated 4th April 2013 (copy enclosed).

4. Pursuant thereto, we were instructed to forward our Client's Account cheque CIMB No. 246305 for the sum of *RM42,045,000.00* only being payment due under for above account pursuant to your letter dated *15th March 2013 and 29th March 2013, with reservation to our client's right and access for the full and correct Statement of Account and for the refund of excess payment based on the actual balance due under the account after Ta'widh and Ibrar and WITHOUT PREJUDICE to our client's right and remedy available in law in respect thereof.*

5. We believe the payment of the sum RM42, 045, 000.00 above would absolve our client 's liability with your good Bank and *would entitle them for a full release from the facility without prejudice to our client's right for correct balance and full refund,* the release of the mortgages and charges, and the uplifting of the receivership status.

A 6. Kindly acknowledged receipt. (Emphasis added.)

[116] See paras 4–5 of the appellant's solicitors letter dated 15 April 2013 at p 1649 of the common core bundle of documents.

B

[117] It was a case where the bank had the vantage position of the securities being intact and the receivership in place and the borrower had little choice but to pay first and dispute later which right the borrower was careful to reserve.

C **[118]** It is thus crystal clear that the payment was subject to the reservation of the borrower's right to a full refund of the excess payment after taking into account the Ta'widh that could be validly charged.

[119] A fresh contract had come into being with a new consideration in that
D the bank would not need to sue for the loan outstanding plus proper and valid Ta'widh charged and the borrower in turn got a release of all mortgages and charges as well as the uplifting of the receivership with the reservation of its right to claim for a refund of the excess Ta'widh paid.

E **[120]** The words 'WITHOUT PREJUDICE' were capitalised just in case the bank might be tempted to overlook it and the payment was strictly without prejudice to its right and remedy available un law in respect of the Ta'widh.

F **[121]** The bank need not have to agree to the conditions or qualifications or reservation of rights set out by the borrower in which case the bank would have to return the cheque and sue for the whole outstanding loan sum plus valid charges of Ta'widh and the borrower would doubtless put in a counterclaim for the excess amount of Ta'widh charged.

G

[122] As it transpired this did not happen as the bank accepted the cheque which cleared and by so doing the bank is deemed to have accepted the terms upon which the payment was made.

H **[123]** In fact, in their letter dated 17 April 2013 the bank had expressly stated that they were receiving the cheque on a without prejudice basis, which is tacit, if not express recognition that they had accepted the payment on the terms stipulated by the borrower, ie that it was paid on a without prejudice basis. The bank's letter reads as follows:

I We refer to your letter dated 15 April 2013.

Please be informed that we will present your client's CIMB cheque No. 246305 to be honoured immediately. Please note that the presentation of the cheque is *without prejudice to our rights with regard to the assertions made in your client's letter dated 4 April 2013 and your letter dated 15 April 2013 in regard to the accuracy of the sums due*

by the borrower. For the record, we do not admit any of the assertions made in your client's letter and your letter.

We reserve all our rights. (Emphasis added.)

[124] Clearly, both sides were not conceding anything where Ta'widh was concerned and both were equally aware that if they cannot agree on the Ta'widh then the court would have to decide.

[125] The borrower had little negotiating power for if it did not pay the amount as stipulated by the bank by the deadline set on 30 April 2013, it would continue to bleed and be under receivership with its attendant reputational risks.

[126] For context on what had become critical, the bank's letter of 15 March 2013 was nothing short of a serious ultimatum before suing as follows:

4. Please be advised that the Bank is agreeable on a strictly without prejudice basis to waive the Ta'widh of RM1 million subject to the following terms and conditions:

(a) *The amount of RM42.045 million is received by the Bank on or before 30.4.2013* (which is the amount due and owing to the Bank as at 30.4.2013 after taking into consideration the RM 1 million waiver of Ta'widh);

(b) The Bank's conditional approval for the waiver of Ta'widh of RM1 million is deemed cancelled and revoked should you fail to comply with the item 4 (a) above and *the Bank will commence legal proceedings against you and all the securities parties* for the whole outstanding balance still owing to the Bank without further reference or notice to you. (Emphasis added.)

[127] The observation of the Federal Court in *CIMB Bank Berhad v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1 would resonate well with the borrower:

[65] Clause 12 may typically be found in most banking agreements. In reality, the bargaining powers of the parties to the agreement are different and never equal. The parties seldom deal on equal terms. In today's commercial world, the reality is that if a customer wishes to buy a product or obtain a services, he has to accept the terms and condition of a standard contract prepared by the other party. The Plaintiffs, as borrowers in the instant case, are no different. They have unequal bargaining powers with the defendant. As succinctly put by Lord Reid in the House of Lords in *Suisse Atlantique Societe D'armament Maritime SS v NV Rottendamsche Kolen Centrale* [1966] 2 All ER 61:

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex conditions which are not so common. In the ordinary way the customer has no time to read them, and if he did not read them he would probably not understand them. And if he did understand and

A object to any of them, he would be generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom of contract must surely imply some choice or room for bargaining.

B [66] In our considered view, this is one instance which merits the application of the principle of public policy. There is the patent of unfairness and injustice to the plaintiff had this Clause 12 been allowed to deny their claim/rights against the defendant. It is unconscionable on the part of the bank to seek refuge behind the clause and an abuse of the freedom of contract. As stated by Denning LJ in *John Lee & Sons (Grantham) Ltd and Others v. Railway Executive* (1949) All ER 581:

C Above all, there is the vigilance of the common law while allowing for freedom of contract, watches to see that it is not abused.

[128] Fortunately for the borrower it had enlisted the assistance of its solicitors to liaise with the bank at the negotiation stage to reserve its rights and D to ensure that it is not being ridden roughshod over.

[129] It is not disputed that the relevant securities in the mortgages and charges were released and the receivership was uplifted. Upon closer examination of the Ta'widh charged as gleaned from the detailed statement of E account furnished it became patently plain that the bank had charged Ta'widh not at the rate of 1%pa but at the IMM and/or the 'r' rate.

[130] With the greatest of respect to the trial judge, she had glossed over and F failed to appreciate the gravity of the terms in the cover letter enclosing the cheque when she observed as follows in her judgment:

42. In the circumstances, I am of the view that these amount to a compromise or accord and satisfaction which is binding on the parties. The plaintiff is therefore not entitled to re-open the compromise reached between the parties under the terms G and conditions of the defendant's letters dated 15 March 2013 and 29 March 2013 and reclaim any part of the Ta'widh or profit paid to the defendant.

43. As such, the plaintiff is estopped from making this claim and reclaiming any part of the Settlement Sum paid.

H **[131]** The offers of the bank in their letters of 15 March 2013 and 29 March 2013 were met with a counter offer of the borrower in its solicitors' letter of 15 April 2013 which cancelled the original offers of the bank and was a fresh offer of the borrower which the bank accepted by receiving and banking in the cheque.

I

[132] After all a counter-offer cancels the original offer and is itself a fresh offer which the bank may accept or reject and here the bank accepted by receiving and banking in the cheque. Section 7(a) of the Contracts Act 1950 provides as follows:

7 Acceptance must be absolute.

In order to convert a proposal into a promise the acceptance must —

(a) be absolute and unqualified;

[133] We need go no further than to quote Professor Visu Sinnadurai, a former High Court judge in his book *Law of Contract* (4th Ed), Vol 1 (LexisNexis) when explaining the ramifications of a counter offer in the following terms at para 2.19:

[2.19] Acceptance subject to new terms: counter offer. In certain cases, the courts may consider the purported acceptance that is qualified by the introduction of a new term as a counter offer destroying the original offer. In such cases, where the purported acceptance has been couched in terms suggesting the introduction of a new term, it has been held to be a counter offer. See also the Indian case of *Moolji Jaitha & Co v Seth Kirodimal* and the English case of *British Road Services v Arthur V Crutchley & Co* , *Butler Machine Tool Co Ltd v Ex-Cell O Corp (England) Ltd* ; and *Compania de Navegacion Pohing SA v Sea Tanker Shipping (Pte) Ltd, the Buena Trader* .

[134] The learned authors Pollock and Mulla on the *Indian Contract and Specific Relief Acts* (12th Ed), Vol 1 Butterworths 2001 explained absolute and unqualified acceptance at p 199 in dealing with the provision of s 7 of the Indian Contract Act of 1872 which are in pari materia with ours, as follows:

A valid acceptance of proposal must be absolute and unconditional. It must extend to all terms of a proposal. *If the purported acceptance is conditional or qualified, it does not create a contractual relationship. It becomes a counter proposal, which may become a contract on the terms offered by the offeree if the proposer accepts it. Such an acceptance would revoke the offer, and the contract cannot be revived on original terms by withdrawing the conditional acceptance*. A bid can be revoked by notice if it has been accepted provisionally or with conditions. (Emphasis added.)

[135] At p 202 under the heading 'COUNTER-PROPOSAL' the learned authors went on to explain:

An acceptance with a variation in terms of the proposal or with a qualification is a counter-proposal, which must be accepted by the original offeror before a contract is made.

[136] There was no room for estoppel to apply to prevent the borrower from suing for the excess Ta'widh paid for that right had been categorically carved out, expressly reserved and properly preserved!

A **[137]** It was a compromise that came with a reservation of the borrower's right. It was an accord and satisfaction subject to the reservation of the borrower's right to challenge the correctness of the Ta'widh charged and to claim for a refund of the excess.

B *Whether limitation should run from the date when full payment of the loan was made subject to the right to challenge the Ta'widh charged*

[138] Even assuming for a moment that there was no moratorium in place until the award is delivered, the borrower is within time to bring this action for
C a refund of the excess Ta'widh paid as the payment of the settlement sum was subject to the term that the borrower would be contractually allowed to claim for a refund of the excess as may be decided by a court of law.

D **[139]** The bank was fully conscious of and consented to receiving the full settlement sum subject to the limited right of the borrower to challenge the correctness and legality of the amount of Ta'widh charged. This is not a case of unqualified and unequivocal accord and settlement whichever way one may want to read the terms of settlement found in the cover letter to the cheque for
E the settlement sum.

[140] The bank could have refused payment and said that they do not agree to the term or qualification set out but by their agreeing to accept the cheque for the settlement sum subject to the term as stated, they cannot now feign
F ignorance and say that there was full and complete accord and satisfaction.

[141] True, the borrower cannot set aside the whole settlement but that it could dispute the amount of Ta'widh charged for that right was clearly spelt out. It is not unlike a payment under protest subject to its right to challenge the
G legality and amount of Ta'widh charged. By accepting the payment made there was a fresh contract entered into which gives the borrower the right to challenge the Ta'widh charged within six years from the date of payment.

H **[142]** That right to sue for a refund of the excess Ta'widh arose when the payment subject to terms was accepted by the bank. This action for recovery of the excess amount of Ta'widh paid being made on 23 August 2017 was well within six years from date of the payment made on 30 April 2013.

I **[143]** At any rate the bank admitted at para 20(e) of the statement of defence that the earliest date they informed the borrower about the Ta'widh charged and at the rate of 7.23%pa was on 17 January 2012. See encl 9 *RR* 2A at p 37 of 177.

[144] The bank had argued that the Ta'widh had been imposed since 1 March 2008 when it was first charged. However, the statement of accounts and the Ta'widh at the 'r' rate together with the detailed particulars and calculation of the Ta'widh was not communicated to the borrower.

[145] The borrower would be able to avail itself of the postponement of limitation seeing that the earliest that it could have known of the mistake in the charge of excessive Ta'widh charge was on 17 January 2012 irrespective of whether the borrower appreciated the import of the Ta'widh charged then or otherwise. Since the borrower as the plaintiff filed the suit on 23 August 2017 it was well within the limitation period of six years.

[146] Section 29 of the Limitation Act 1953 is applicable where the relevant provision reads as follows:

> 29 Postponement of limitation period in case of fraud or mistake
>
> (1) Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) *the action is for relief from the consequences of a mistake*, *the period of limitation shall not begin to run until the plaintiff has discovered* the fraud or *the mistake*, as the case may be, *or could with reasonable diligence have discovered it*: ... (Emphasis added.)

PRONOUNCEMENT

[147] Looking at the overall circumstances of this case and the fact that the bank had charged Ta'widh in excess of what was permitted contractually as per section 9.32 of the asset sale agreement and further that the payment of the settlement sum of RM42.045m by the borrower was clearly without prejudice to their claim for a refund based on the correct amount outstanding, we were constrained to allow the borrower's claim for a refund of the excess Ta'widh paid.

[148] Indeed as we have stated above, the borrower's claim in the High Court was clearly within limitation, its right to a refund having arisen only at the point when payment was made as required by the bank with finally both parties reserving their rights where the issue of Ta'widh was concerned and which issue we had finally decided in favour of the borrower.

[149] We had allowed the borrower's/appellant's appeal and ordered the bank to pay back RM5,005,285.79 to the borrower being a full refund of the excess Ta'widh paid under protest and with full reservation of rights. The decision of High Court was set aside with costs.

[150] The counterclaim of the bank of RM1m being the discount given for the Ta'widh charged was consequentially allowed now that the correct Ta'widh chargeable had been ascertained and ordered to be refunded. We agree with the bank that if any part of the borrower's appeal is allowed then the discount or the partial reduction or waiver of the Ta'widh ceases to have effect or be binding on the parties.

[151] In respect of the borrower's appeal in Appeal No 2512 we allowed costs of RM50,000 to the borrower here and below and subject to allocator.

[152] In respect of the bank's appeal in Appeal No 2522 we made no order as to costs.

Order accordingly.

Reported by Ashok Kumar